

Elizabeth E. Poel v. U.S. General Accounting Office

Docket No. 15-209-17-82

Date of Decision: February 7, 1984

Cite as: Poel v. GAO (2/7/84)

Before: Simmelkjaer, Presiding Member

Reprisal

Exercise of Appeal Rights

Prohibited Personnel Practices

DECISION OF THE PRESIDING MEMBER

The General Counsel of the Personnel Appeals Board, on behalf of the Petitioner, Elizabeth E. Poel, filed a Petition for Review with the Board alleging that the Respondent committed certain prohibited personnel practices by failing to promote Petitioner to the position of Chief, Audit Reference Services (ARS) GS-13, in the Library. The Petitioner maintains that such action constituted a prohibited personnel practice (a) because it was based upon reprisal for the Petitioner's exercise of her grievance rights, in violation of 5 U.S.C. §2302(b)(9), and (b) because it gave an unlawful preference to outside candidates (non-GAO employees), in violation of 5 U.S.C. §2302(b)(6).¹

5 U.S.C. §2302(b)(9) provides:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--

(9) take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule, or regulation.

An employee charging that a personnel action was taken or not taken in reprisal for filing a grievance must prove:

1. That she engaged in a protected activity;
2. That she was treated adversely; and
3. That there was a causal connection between the two. 5 U.S.C. §2302(b)(6) provides:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority --

(6) grant any preference or advantage not authorized by law, rule or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.

To establish Petitioner's charge that her non-selection for promotion was based upon an unlawful preference for outside candidates, in violation of 5 U.S.C. §2302(b)(6), she must prove that:

1. A preference was granted;
2. The preference was not authorized by law; and
3. The preference was granted to improve or injure someone's prospects.

Factual Background

Petitioner began her career at the General Accounting Office as a GS-9 reference librarian in 1976. By 1979 three teams were formed in the Audit Reference Service section (ARS) of the Library. Competition was held to select team leaders. Petitioner was one of those chosen and promoted to GS-12.

Sometime in 1980 a decision was made by library and higher level management to establish and fill the position of Chief, ARS. A vacancy announcement (#81-1089) was posted on February 12, 1981, with a closing date of March 16, 1981. This announcement was mailed to other libraries in the area.

Petitioner obtained a special performance appraisal from Marju Parming, who was then her supervisor and the selecting official for the position. Using this appraisal and a GAO form for internal applicants, Petitioner applied in a timely manner for the position.

About the same time vacancy announcements #B-81-423 (GS-12 Team Leader) and #81-1080 (GS-13 Chief of Technical Services Section) were posted at GAO. No special mailing of these announcements was done. Pending the filling of these vacancies, Guy Wilson and Bonnie Mueller were made acting Team Leader and acting Section Chief, respectively. No one was made acting ARS Chief at this time.

In March of 1981, Ms. Parming received a certificate for the Technical Services Chief job. She interviewed all the candidates on the certificate and selected Bonnie Mueller. Prior to the interviews, a freeze had been placed on all hiring and promotions in GAO. As of June 12, 1981, this freeze was lifted for internal hires only. On June 25, 1981, Ms. Parming selected Ms. Mueller, signed the certificate and returned it to the Personnel Office.

Ms. Parming interviewed only Guy Wilson on the Team Leader certificate. Ms. Parming received the certificate on July 20, 1981, and returned it to Personnel with the choice of Mr. Wilson marked on July 21, 1981. By this time, the freeze on hiring from outside GAO also had been lifted.

In late 1980 Petitioner learned of criticism of one of her subordinates, Jean Doyle, for excessive socializing. In February of 1981, Ms. Doyle indicated to Petitioner that she could not complete a project on the team's plan in a timely fashion but almost simultaneously had arranged on her own to take on another project. Petitioner counseled Ms. Doyle about her assignments, hoping that she would resolve the problem on her initiative. Petitioner did not mention the issue of socializing at the counseling in February.

Several weeks passed and Petitioner noted that the situation had not corrected itself. Consequently she spoke to Jean Doyle again. This time the socializing issue was raised and Ms. Doyle became quite upset. Ms. Doyle then went to Ms. Parming to complain about this matter. As a result, Ms. Parming and her supervisor, Benita Mathur, placed Petitioner under a 60-day supervisory review. Petitioner grieved such

treatment, in accordance with established GAO grievance procedures.

According to the Stipulation of the parties, the grievance was processed as follows:

- May 5, 1981 - Filed with Ms. Parming and Ms. Mathur, head of Library.
- May 12, 1981 - Ms. Parming responds.
- May 20, 1981 - Filed with Richard Brown, Division Director for General Services and Controller (GS&C)
- June 2, 1981 - Mr. Brown responds.
- June 12, 1981 - Submitted to Felix Brandon, Director of Personnel.
- July 16, 1981 - Mr. Brandon responds.
- July 27, 1981 - Filed with the Comptroller General.
- November 23, 1981 - Comptroller General issues final agency decision.

During the processing of the grievance, Petitioner considered searching for another position. She approached Mr. Brown for assistance in obtaining an appraisal to use in her job search. He spoke to Susan Burtner, his deputy, in this regard. Petitioner was then told that Mr. Dwyer, head of SPAS, wanted to speak with her about a possible position. The two of them met on several occasions and discussed a job monitoring a motel contract. On July 13, 1981, Petitioner indicated she was not interested in leaving a library job and going into a management analyst position, from which she would be placed elsewhere when that job was completed. On July 28, 1981, Petitioner was called into a meeting by Ms. Parming. There she was given a memorandum from Mr. Brown stating that she was to be reassigned immediately to work on this motel contract. After Ms. Poel indicated her attorney would appear at a meeting the next day to discuss the matter further, the reassignment was dropped.

On July 24, 1981, Ms. Parming sent a memorandum to the Personnel Office cancelling the ARS Chief job. In her deposition she gave as her reasons for the cancellation a possible reorganization, the staleness of the certificate, and her desire that the choice be made by the new Branch Chief.

Ms. Phyllis Christenson, who was then law librarian, was appointed acting ARS Chief at the time the vacancy announcement was cancelled. In October 1981, Ms. Christenson became acting Branch manager. (Ms. Parming, the prior Branch Manager, had been promoted.) She became permanent Branch Manager on December 27, 1981.

On December 28, 1981, the ARS Chief position was posted for the second time. Petitioner sought a special performance appraisal from Ms. Christenson and submitted it with her background as an application for the position. Along with other applicants from internal and external sources, she was placed on the certificate of best qualified candidates. The external applicants were rated by a panel which included Ms. Parming. The certificate was sent to Ms. Christenson on March 2, 1982. Ms. Christenson's calendar for this period shows interviews of the six external candidates between that date and April 2, 1982. Mr. Merryman, an internal candidate, was interviewed on April 8, 1982. Ms. Trivizas, also an internal candidate, withdrew from consideration. The Petitioner was interviewed on April 8 and 12, 1982. On April 6, 8 and 9, 1982, three of the external candidates were further interviewed by Marju Parming and/or Joel Dwyer, who was then acting Director of the Office of Information Systems and Services (OISS), which oversees the Library. On April 12, 1982, Ms. Christenson selected Maureen Canick, an external candidate, for ARS Chief and forwarded the certificate to Personnel. Because a new freeze on hiring from outside had taken effect on January 19, 1982, it was necessary to request an exception in order to hire Ms. Canick. This request was initiated by Joel Dwyer, initialed by Richard Brown, and approved

by Milton Socolar, Special Assistant to the Comptroller General. Ms. Canick's selection was announced on April 26, 1982.

Petitioner's Position

The Petitioner contends that a causal connection between her grievance and her non-selection has been demonstrated in at least six ways.

First, according to Petitioner, the timing of actions following the filing of her grievance on May 5, 1981, all reflect an effort to thwart her selection as ARS Chief. As the General Counsel put it, "knowing that Petitioner was probably on the certificate and possibly still believing she would have to pick an internal candidate due to the freeze on hiring externally and knowing that the logical internal choice would be Petitioner, Ms. Parming, Petitioner's supervisor and acting Branch Manager, cancelled the first vacancy announcement on July 24, 1981." The General Counsel discounts the reasons given for the cancellation, namely a pending reorganization, the staleness of the certificate, and deference to the new Branch Manager, because the reorganization never occurred, Parming had the option according to the testimony of a personnel specialist to request another certificate, and her desire to yield to a new Branch Manager did not deter the filling of other positions (Chief of Technical Services and Team Leader).

Respondent's attempt to detail Petitioner into SPAS on July 28, 1981, one day after her grievance was filed with the Comptroller General, is viewed suspiciously because Ms. Poel had previously declined the detail. Witness Tebeau characterized the meeting as an effort to "railroad" Petitioner.

Petitioner also construes the appointment of Ms. Christenson as acting ARS Chief as detrimental to Petitioner's promotional opportunity because it ran counter to a prevailing practice of naming someone internally to fill acting positions and resulted in Ms. Christenson assuming three management positions simultaneously; namely, acting Branch Manager, Chief of the Law Library, and acting ARS Chief.

Since Ms. Parming, the subject of Petitioner's grievance, promoted Ms. Christenson, who filed the second posting of the ARS vacancy and who eventually filled the position, a close relationship between these actors is presumed. Parming's role as a panel member and second-level interviewer is also viewed as a source of her influence. Furthermore, Mr. Brown is connected to the process through his memorandum attempting to detail Petitioner to SPAS, which appeared in the grievance file.

Second, Petitioner alleges that the filling of two other vacancies--Team Leader, GS-12, and Chief of Technical Services, GS-13--while the ARS Chief vacancy was cancelled and subsequently distributed to additional libraries constituted disparate treatment. General Counsel Exhibits 19 and 20 were offered for the purpose of demonstrating that in "virtually every library position, GS-12 to GS-15, where there were internal qualified applicants, an internal person was selected." Unlike Ms. Mueller and Mr. Wilson, who acted in a vacancy before the permanent selection was made, who filled these vacancies from the internal pool, and whose vacancies were not cancelled, Petitioner was allegedly subject to different treatment.

Third, the Petitioner finds fault with the interview process. The General Counsel points to conflict between the testimony of Ms. Christenson regarding the interview questions she asked Petitioner and the Petitioner's notes from that interview. Questions asked only of the Petitioner, namely, "How she perceived herself in the organization?" and "What would be her biggest problem in the organization?" juxtaposed against questions asked of all other candidates, save Petitioner, namely, those focusing on information systems and supervisory experience, suggest a process in Petitioner's judgment designed to diminish her

chances of success.

Ms. Christenson's shifting of criteria from those started in the vacancy announcement to stressing information systems knowledge in her deposition and later emphasizing interpersonal relationships at the hearing are deemed evidence of a "tainted" interview process. Moreover, the process was allegedly distorted when second-level interviews, for which no precedent existed, were conducted with the external candidates. The General Counsel noted conflicting testimony among Dwyer, Parming, and Christenson with respect to their respective roles in the second-level interviews. Whether they were definable as interviews or meetings and who among them had suggested these interviews were deemed salient discrepancies. According to the General Counsel, the efforts of Christenson and Parming to conform their testimony on these matters reflect ulterior and illegal motivation.

Fourth, the Library atmosphere which one Petitioner witness characterized as replete with "rumors, intrigue, and negative comments about most senior staff members" is cited as a factor supporting a causal relationship in the instant case. The testimony of Bonnie Trivizas that a "hit list" existed in the Library, the testimony of Mark Scully that the atmosphere in OISS was "controlled and restricted" and the reluctance of two witnesses to testify were offered as evidence of management intimidation. Scully's testimony which alleged that two senior Library employees were transferred without warning and Parming's reiteration of Petitioner's request for intervention of her supervisors in a performance appraisal were compared to the attempted detail of Petitioner in terms of a Library management propensity to punish non-conformity.

Fifth, Petitioner maintains that the Agency's grounds for the actions taken were unsubstantial. The asserted reasons for the cancellation of the ARS Chief vacancy have been discussed previously. The grounds for the attempted detail of Petitioner are also considered weak in that Petitioner informed Mr. Dwyer on July 13, 1981, that she did not want the motel contract position, the agency's urgency to fill the position was refuted when in fact it was never filled, and Petitioner was given only twenty-four hours to reach a decision.

An important element in Petitioner's assertion that her non-selection was based upon insubstantial grounds is her conclusion that a reasonable selecting official impartially reviewing this qualifications of the candidates and the ARS Chief position criteria could only have chosen Petitioner. The General Counsel argues that Petitioner's experience as a reference librarian (critical element number one) far exceeded those of the selectee, Maureen Canick, and since the ARS Chief position requires supervision of reference librarians, Petitioner was the logical choice. Reviewing the qualifications of the selectee, the General Counsel maintains that Ms. Canick's reference knowledge is minimal, her major skills area entailed indexing which is substantively distinguishable from reference work, and her prior supervisory activity did not involve the typical functions of employee discipline, evaluation or counseling--supervisory skills which Ms. Christenson said were essential.

Having found the selectee's reference skills and supervisory experience generally less impressive than Petitioner's, the General Counsel then cited the testimony of various witnesses with specific knowledge of Petitioner's superiority in the areas judged relevant and produced documents purportedly reinforcing Petitioner's leadership and supervisory ability. For example, Dexter Peach, Director of EMD, praised Petitioner's planning abilities, her communication skills, and the productivity of her team. The testimony of co-workers was uniformly positive with Guy Wilson finding her to be "a conscientious, diligent, and hard-working librarian and supervisor;" Adrienne Chute calling her "one of the best supervisors in the

Library;" and Carol Johnson referring to her as "one of the best" in the Library. Equally positive was the testimony of Elizabeth Conway, a subordinate, who described Petitioner as the "best supervisor she ever had." The testimony of those named in the Petition was also alluded to in support of Ms. Poel's qualifications for the ARS Chief position. Ms. Christenson's evaluation of Petitioner noted that she had counseled and evaluated team members in a timely manner and planned their activities in line with Library goals successfully. This evaluation also stated that Petitioner has been a successful team leader and she anticipates Petitioner could perform such tasks successfully with a larger work group. Marju Parming testified that Petitioner's team was quite productive. Parming also provided her with a special performance appraisal for the first ARS Chief vacancy announcement.

Petitioner also testified in her own behalf regarding her leadership in Library projects such as the handbook, various suggestions she made described in General Counsel Exhibits 9 and 10, and staff development activities which included facilitating early promotions for certain staff members, holding open a vacancy for a valued subordinate, and working to get the career ladder for GAO librarians raised to GS-12. The Petitioner also submitted testing instruments completed by her subordinates for the purpose of reinforcing her supervisory qualities.

In his brief, the General Counsel found several statements of witnesses Christenson and Parming contradictory regarding the interpersonal skills of the Petitioner. According to the General Counsel, if, on the one hand, Christenson and Parming testify that interpersonal skills are the most important asset of a reference librarian and Petitioner has received high performance appraisals as a reference librarian, they cannot, on the other hand, claim she lacks interpersonal skills. Similarly, the General Counsel maintains that the testimony of Christenson which was critical of Petitioner's supervisory performance was contradictory when compared to her positive performance appraisal on identical skills. In the General Counsel's judgment, the positive dimensions of Petitioner's previously documented management skills, "such as: productivity measures, promotion records, and evaluation reviews" were deliberately distorted by testimony at the hearing to "justify the weak selection" by Christenson and is further indicative of "collusion" between Christenson and Parming. As the General Counsel puts it, "there is no evidence that these deficiencies existed prior to the hearing."

The Petitioner claims that inconsistent testimony and contradictory testimony on the part of Parming and Christenson have eroded their credibility. In this respect, several instances of alleged inconsistency between the testimony of Christenson and that of Petitioner witnesses were cited, such as: whether she had read and sought a correction in Parming's deposition; whether the three external candidates were interviewed by Dwyer at his request or initiated by Christenson. Contradictions in the testimony of Parming who stated in her deposition that there were no discussions following the second-level interviews, with that of Christenson who stated that Dwyer and Parming commented favorably about the external candidates following these interviews, reveal clear credibility problems according to the Petitioner. This credibility problem, in Petitioner's judgment, was compounded when Parming, after reading Christenson's deposition, changed her testimony to support Christenson's version of the event. Additional examples of alleged inconsistency on Parming's part were provided on issues such as: who appointed Christenson to be acting ARS Chief; which candidates for the ARS Chief job got second-level interviews; and did any policy exist against making a GS-12 employee acting ARS Chief?

Sixth, the Petitioner contends that her case rests upon the credibility and preponderance of evidence which connects Ms. Parming to Ms. Christenson. Unless Petitioner can establish that Parming, who was the subject of the grievance, retaliated against Petitioner by influencing Christenson's decision, "then this case

merely represents a circumstance for management discretion in a selection decision." (G.C. Brief, p. 50).

According to the Petitioner, evidence of an undesirable connection between Christenson and Parming is supported by alterations in their respective testimony as well as alterations in their evaluations of Petitioner. In addition, Parming's appointment of Christenson to acting ARS Chief and Parming's involvement in the ARS Chief promotion action, including service on the ranking panel, participation in the second-level interviews, and communication with Dwyer during the selection process, were offered as evidence of the connection. From the Petitioner's standpoint, the most damaging evidence of the Christenson/Parming collusion emerged when they testified that, despite their serious reservations about placing Petitioner in the position of ARS Chief and their mutual concern about the negative consequences such a promotion could have on Library morale, they never discussed the matter together.

In summarizing her position, Petitioner maintains that Parming's influence on Christenson's non-selection of Ms. Poel was manifested in several ways. Petitioner argues that Christenson, knowing of Petitioner's grievance and Parming's propensity for reprisal, responded by relying upon negative hearsay, changing her story to conform with Parming's testimony, and ultimately acting on weak, insubstantial grounds. Reviewing the circumstantial evidence that purportedly supports a "cover-up", Petitioner points to the alleged hit list, the selectee's weak reference and supervisory qualifications, the cancellation of the ARS announcement, the attempted detail, and the lack of credibility of Respondent witnesses as proof that but for the grievance Ms. Poel would have become ARS Chief.

Finally, Petitioner argues that the selection was based upon an unlawful preference for outside candidates in violation of the agency's merit promotion regulations which states that "all candidates must be considered impartially in accordance with merit principles." According to Petitioner, this preference, which had the effect of injuring her promotional prospects, was facilitated by the exclusion of internal candidates from the second-level interviews, including the subsequent discussion of external eligibles, the statements of Parming and Christenson that they preferred outsiders, and the advertisement of the ARS Chief position outside normal sources. For these reasons, Petitioner contends a prohibited personnel practice has occurred.

As a remedy, Petitioner seeks retroactive promotion to the position of ARS Chief, GS-13, effective September 1, 1981.

Respondent's Position

First, the Respondent maintains that the Petitioner has failed to prove that any Agency official other than Phyllis Christenson had the authority to take, direct, recommend, or approve the challenged personnel action or that another Agency official exercised or attempted to exercise any said authority regarding the selection of Maureen Canick. Therefore, the Respondent concludes that "all questions of intent in the instant case must be decided by looking solely to the manner in which Phyllis Christenson exercised her broad discretionary authority to select an ARS Chief." Both parties concede that any evidence which cannot be demonstrated to have had an effect on Christenson's decision in 1982 is not relevant to the case.

Second, the Respondent further maintains that the Petitioner has failed to demonstrate a causal connection from which a retaliatory intent can be inferred. According to the Respondent, the absence of evidence that the officials against whom Petitioner's grievance was filed contributed to Petitioner's non-selection invalidates the allegation of influence. Referring to the testimony of Christenson, Respondent argues that she was not influenced by any of her supervisors, although she was aware of the grievance through

communications with Petitioner. Respondent also credits the testimony of Parming to the effect that she had no role in the decision to re-advertise the ARS Chief position nor had ever discussed Petitioner's grievance with Christenson. The testimony of Mr. Brown, Director, GS&C, indicating that he never discussed Petitioner's grievance with Christenson nor responded atypically to it is given credence by Respondent. In Respondent's view, accepting the fact that Christenson on her own initiative arranged for Dwyer and Parming to meet the external candidates she was considering goes to the question of preference and not to reprisal.

Third, the Respondent contends that Petitioner has failed to establish that management's reaction to Petitioner's grievance establishes a causal connection. According to Respondent, each GAO official involved in the grievance process acted routinely and in good faith; therefore, no retaliatory animus can be discerned. Parming's decision to cancel the vacancy announcement was allegedly justified by legitimate business purposes, namely, the unavailability during the pendency of a hiring freeze of a certificate of eligibles and the pending reorganization. Respondent also discounts the proposed detail of Petitioner as evidence of retaliation since the detail assignment originated with Petitioner's request and was canceled when her objections emerged. Moreover, the testimony of Petitioner that after filing the grievance she did not encounter negative feedback from Parming or any other supervisor is deemed indicative of proper management behavior. The inadequacy of Petitioner's evidence regarding retaliation following the filing of the grievance leads Respondent to the conclusion that the retaliatory motive needed to establish a prima facie case of reprisal is absent.

Fourth, the Respondent contends that no applicant received any preference or advantage. The announcements sent to selected libraries were not deemed a preference because mere information to selected libraries based on size rather than to specific individuals provided no advantage to external candidates especially since Petitioner received the same notice.

In addition, what Respondent describes as "courtesy introduction of external candidates to the selecting official's supervisors" is viewed as having offered no preference or advantage to any candidate. The fact that the external candidates were "introduced" to the supervisors prior to the completion of Petitioner's two-part interview is deemed insufficient evidence to support the allegation of preference because Petitioner had received a review and interview by Dwyer eight or nine months earlier and Christenson and Parming were conversant with her qualifications. If any advantage accrued to a candidate, Respondent argues Petitioner was the beneficiary since her interview concluded on April 12, after all the other interviews were completed. Accordingly, Respondent argues that Petitioner failed to prove that the "introductions" afforded external candidates were unauthorized, constituted a preference, or were held for the purpose of injuring Petitioner's prospects.

Respondent further maintains that no evidence was presented which proved that any action connected to the selection of Maureen Canick was unauthorized. Citing GAO Order No. 2335.6, "Competitive Selection Program", which provides that "to guard against inbreeding in jobs that need fresh viewpoints..., outside candidates may be considered to assure selections which enhance the efficiency and effectiveness of GAO," the Respondent contends its actions were pursuant to this Order. Respondent rejects Petitioner's argument that the failure to select an internal candidate constituted an unauthorized preference and a deviation from past practice because the complained-of actions were authorized, and consistent with Christenson's practice of selecting external candidates and the division's policy of broadening competition.

Respondent also maintains that Ms. Christenson took no action for the purpose of injuring Petitioner's prospects for selection. Assuming arguendo that it has been shown that a preference for external candidates existed, Respondent argues that Petitioner "must also demonstrate by a preponderance of the evidence that those introductions were purposeful to injure her prospects for selection." Wellman v. Department of Commerce, MSPB Docket No. SL 075209070, 82 FMSR §5150, slip op. at 6 (March 24, 1982). Respondent concludes that Petitioner failed to meet her burden of proving that Christenson intended to injure Petitioner's prospects by arranging introductions with her supervisors who did not participate in the final selection process. Since Christenson alone possessed the authority and power to make the selection, Respondent argues it would have served no useful purpose to grant a preference to others to ensure Petitioner's non-selection.

Fifth, Respondent alleges Petitioner has failed to meet her burden of proving that her grievance was a substantial motivating factor in Ms. Christenson's selection. Respondent argues that "only after the protected conduct is shown to have been a substantial motivating factor does the burden shift to the Agency to demonstrate the same action would have resulted even absent the protected conduct." From arguments previously addressed, the Respondent denies that such a showing was made; therefore, the burden did not shift to the Agency.

Sixth, Respondent maintains that Petitioner would not have been selected even if she had not filed a grievance. The testimony of Christenson is cited to support the contention that observations of Petitioner's supervision of subordinates and complaints from Petitioner's subordinates minimized the probability of her selection. This testimony was allegedly corroborated by Dr. Barbarin who testified about having to counsel Petitioner's co-workers regarding their difficulties and by Ms. Jenkins who testified that her technicians were reluctant to inform Petitioner that she was "breaking the Library's mail-handling rules." An additional basis for Petitioner's non-selection was provided in Parming's testimony that Petitioner surreptitiously recorded their conversation and covertly copied a document which was on her desk. In Respondent's judgment such behavior negatively impacted on Petitioner's integrity and constituted a legitimate factor for Christenson to consider in making her decision. Using the advice of Dr. Barbarin that leadership qualities and interpersonal skills were important criteria for the ARS Chief position, Christenson testified that even if there had been no external candidates Petitioner would still not have been selected.

Seventh, under a heading entitled "Special Considerations in Reviewing Promotions Decisions," Respondent cited cases which it contends bear directly on the instant case. It notes that the MSPB does not have jurisdiction to review non-promotion or irregularities in promotion procedures nor entertain a challenge to an Agency's decision to limit the field of applicants for a particular position. It further notes that federal courts recognize that federal agency promotion actions are subject to very limited review, decline to rule on a plaintiff's qualifications for a position compared to those of an incumbent, or interfere in discretionary Government personnel matters. According to the Respondent, the principles of "non-interference in discretionary governmental action and the general presumption that the Government has discharged its duties in good faith and in a legal and proper manner" normally control in similar cases. EEO decisions concerning selection procedures are generally not disturbed unless a discriminatory motive is discerned. An employer's mere misjudgment of the qualifications of an applicant will not expose that employer to liability, nor will a promotion process which involves highly subjective determinations thereby be rendered invalid. Thus, according to the Respondent, managerial discretion rather than rigid objectivity when applied to the instant case upholds Christenson's decision as a "legitimate and non-discriminatory exercise of the authority entrusted to her by statute and regulations."

FINDINGS

The issue before the Personnel Appeals Board is whether the Respondent, GAO, committed a prohibited personnel practice by failing to promote Petitioner, Elizabeth Poel, to the position of Chief, Audit Reference Service (ARS), GS-13. The Petitioner maintains that such action constituted a prohibited personnel practice because (1) it was based on reprisal for the Petitioner's exercise of her grievance rights and because (2) it gave an unlawful preference to outside candidates.

In order to sustain Petitioner's first ground for establishing a prohibited personal practice three elements would have to be proven by a preponderance of credible evidence. They are as follows:

1. That she engaged in a protected activity;
2. That she was treated adversely; and
3. That there was a causal connection between the two.

The first two elements are clearly established and therefore require no discussion. Petitioner filed a grievance on May 5, 1981, and such action constitutes protected activity, and she did not receive the promotion.

The Petitioner has sought to establish causal connection inter alia through the linkage of several events, including the taking or failure to take actions which affected Petitioner's candidacy, and challenges to the credibility of key witnesses.

The General Counsel has alleged that Ms. Parming cancelled the vacancy announcement on July 24, 1981, because knowing that Petitioner was probably on the certificate, and knowing that past practice indicated the selection of an internal candidate, Petitioner would be the logical choice. In the Presiding Member's judgment, Petitioner's argument presumes more than the evidence can support. The fact that Parming acted legitimately within her managerial discretion to cancel the announcement because she had not received a certificate and believed the candidate list required renewal seems to be a proper exercise of her authority, despite the fact that testimony from the personnel specialist suggests she had the option to obtain another certificate. An act which is proper and legitimate in the context in which it was taken cannot be adversely construed because it did not promote Petitioner's candidacy.

A related matter is the pending reorganization which Parming testified influenced her decision to cancel the announcement. The issue, in the Presiding Member's judgment, is not whether the reorganization occurred, but whether it was a relevant consideration at the time the cancellation decision was made. The evidence supports the contention that reorganization which would have affected the audit Reference Service was under consideration during this period.

The Presiding Member also has difficulty with Petitioner's argument that she was the logical candidate. There is no evidence to suggest that the other two internal candidates (Merryman and Trivizas) who appeared on the certificate of eligibles were less logical choices for the ARS Chief position. Any actions which affected Petitioner would have similarly affected these candidates.

The Petitioner further alleges that an attempt was made to detail her into SPAS on July 28, 1981, an action which is viewed suspiciously because it occurred one day after the filing of her grievance with the Comptroller General. Testimony from Petitioner and Tebeau suggests that this detail was designed to "railroad" her out of the Library into a dead-end position which did not utilize her librarian skills. Were it not for the fact that the initial request for an alternate assignment was made by the Petitioner and was subsequently cancelled when Petitioner objected, this allegation would have greater credence. It does not constitute untoward behavior on management's part to seek accommodation of a grievant's request as a means of settling an outstanding grievance. Petitioner's argument that the detailed proposal constituted one phase in a series of retaliatory acts is further diminished by her testimony that following the grievance filing she was treated equitably by her supervisors.

According to Petitioner, another example of adverse treatment was the failure of Parming to appoint her as Acting ARS Chief, a practice she maintains prevailed in "virtually every Library position, GS-12 through GS-15, where there were internal qualified applicants." The temporary filling of two other vacancies, namely, Team Leader, GS-12, and Chief of Technical Services, GS-13, by acting internal candidates is construed as evidence of disparate treatment. Ostensibly, Petitioner's argument appears persuasive. However, further analysis reveals that unlike Mueller and Wilson, who were the sole internal candidates deemed eligible for their positions, Petitioner was one of the three eligible candidates. Thus, the Presiding Member credits Respondent's argument to the extent that only if Petitioner had been treated differently from Merryman would a case of disparate treatment emerge. Unless one accepts Petitioner's assertion that she was the only logical candidate, her selection as acting ARS Chief could have negatively impacted on Merryman's promotional opportunity. Given this situation, the appointment of Christenson as acting ARS Chief, despite her additional responsibilities, seems reasonable especially since she was ultimately responsible for selecting the permanent ARS Chief.

The Petitioner further contends that the interview process entailed irregularities which negatively impacted on her candidacy. These alleged irregularities included alterations in the criteria from the vacancy announcement to the interview process, differences in questions asked of Petitioner compared to external candidates, and differences among witnesses as to the purpose and description of the second-level communications. These alleged irregularities are viewed by the Petitioner as evidence of both an effort to retaliate against her for filing a grievance and an unlawful preference for external candidates.

Since the parties have stipulated that "Phyllis Christenson interviewed all the best qualified candidates," the issue is whether Petitioner's interview process was significantly distinguishable from that of her peers to warrant an inference of maltreatment. Although the evidence is persuasive that Petitioner's recollection of the interview process varies somewhat from that of Christenson, it was not established that identical interview questions and format were necessary to ensure equal treatment. The fact that questions were asked of Petitioner which pertain to her internal status in the Library such as: "How do you perceive yourself in the organization?" would be proper if other candidates, particularly external candidates, could not be reasonably expected to field these queries. Flexibility in the interview process can be seen as a benefit as well as a detriment. Here again, there is no evidence that the other internal candidates received interview treatment more favorable than Petitioner. The questions posed to Petitioner, even if slightly different from those of her competitors, were fair, pertinent to the interview process, and ones which a candidate in Petitioner's position should have been prepared to answer.

With respect to the alleged varying criteria employed by the selecting official, Petitioner contends that during her interview knowledge of information systems was stressed--a factor which does not appear in the vacancy announcement or position description. The Respondent's argument that the vacancy announcement sets forth minimal qualifications as opposed to exclusive qualifications seems credible. Even so, General Counsel's Exhibit #18 contains sufficient references to "computerized systems and services," and "knowledge of the theories and techniques of information science" to justify questions concerning information systems. In addition, the selecting official's statement that technical qualifications were important in her deposition is not in conflict with her subsequent testimony that "interpersonal skills were the most important factor." Inasmuch as both qualities were deemed essential and can be derived from the vacancy announcement and position description, Christenson's varying emphasis on these abilities is reasonable even if not totally consistent. Moreover, Petitioner gives considerable weight to the alleged inconsistencies of testimony provided by Christenson and Parming regarding Petitioner's interpersonal skills as a reference librarian. Clearly, the fact that Petitioner possessed exemplary interpersonal skills as a reference librarian does not lead inexorably to the conclusion that this same level of interpersonal skills met the requirements for supervision of the Audit References Service. The selecting official had the authority to exercise her discretion in this area and therefore much of the testimony which has been construed as detrimental to Petitioner's evaluated effectiveness on this criterion is viewed by the Presiding Member as an effort to differentiate the functions for which interpersonal skills were desired.

Petitioner also places considerable emphasis upon the occurrence of second-level interviews or meetings, the identity of the individual responsible for their initiation, and the purpose of these interviews or meetings. The real issue is whether the exposure of the external candidates to the selecting official's supervisor was unauthorized, highly irregular, or prejudicial to Petitioner's status. The Presiding Official concludes that this interaction irrespective of whether it minimally constituted an interview did not ipso facto jeopardize Petitioner's candidacy because she was able to complete an interview and as an internal candidate there was no need for her to meet GAO management. The opportunity afforded top outside candidates to meet with GAO management could be reasonably interpreted as both a courtesy and means of equalizing the status of all candidates under consideration.

The role of Dr. Barbarin was also cited as a source of contradictory testimony by the Petitioner. Christenson's testimony that no one advised her about the qualifications to consider in filling the ARS Chief position is set against her subsequent testimony that she discussed qualifications with the consultant. The Presiding Member regards this distinction as a minor point explainable by the fact that the advice received was not construed as the kind of influence which would emanate from supervisors.

Under the heading of weak and insubstantial reasons for the Agency's action, the selection of Maureen Canick as ARS Chief is accorded considerable weight by the Petitioner. The bulk of the evidence adduced serves the purpose of reinforcing Petitioner's qualifications for the ARS Chief's position while at the same time diminishing the qualifications of the selectee. Comparing the SF-171 of Petitioner with that of the selectee, Petitioner argues that on several critical job elements, Petitioner was superior to the selectee. For example, with respect to reference experience and knowledge of research and reference, Petitioner is deemed superior to the selectee whose background as an indexer is discounted as insufficient. As the General Counsel puts it, "To put someone with so little reference knowledge in charge of a large reference section is, according to the credible testimony, absurd." Witnesses for the Petitioner testified about the reference skills needed to supervise the Audit Reference Service and the difficulties the selectee would encounter unless she possessed this credential initially. Similarly, the superiority of the Petitioner as a supervisor was articulated and negatively compared to the selectee's lack of related experience in

evaluation, discipline and counseling of employees. That the selectee was sent for basic supervisory training on her arrival was offered as further evidence of a weak selection designed to bypass the more qualified Petitioner. In addition, documentary and oral evidence was produced to demonstrate that the Petitioner's work products, evaluation by colleagues and supervisors, including Parming and Christenson, evidenced a highly qualified candidate who would have been appointed as ARS Chief but for the prohibited personal practice.

Juxtaposed against the cumulative evidence of Petitioner's qualifications is the testimony of Christenson who testified that the most important strength for the ARS position was interpersonal relations. As previously indicated, the selecting official had the discretionary authority to evaluate and weigh the interpersonal and technical skills of Petitioner vis a vis those of her competitors and render a professional judgment. This judgment, even if one that others might not have made and even if based on subjective factors, was within her authority. Clearly, Petitioner was eminently qualified for the position if the criteria of prior reference work and knowledge of the ARS were given more weight, but Christenson was not compelled to assess her credentials in this manner. Apparently, the range of experiences and supervisory demeanor presented by Canick best filled the position requirements in Christenson's judgment. Unless that decision is shown to be totally irrational, bearing no reasonable relationship to the selection criteria, then the Presiding Member is reluctant to disturb it. Reviewing the testimony of Christenson, the Presiding Member concludes that even if Petitioner had not filed a grievance, Petitioner would still not have been selected as ARS Chief.

The Library atmosphere was also cited as a contributing factor to Petitioner's adverse treatment. Testimony regarding the existence of "hit lists" and an "oppressive environment" was offered to support a causal connection between the filing of the grievance and management retaliation. The hearsay aspect of this testimony combined with the remote relationship of these witnesses to the Petitioner's grievance time frame diminished its relevance to the instant case. It was not proven that the so-called oppressive climate caused the selecting official to act in ways different from what would have been her normal course of conduct.

There are obvious credibility questions in the testimony of Parming and Christenson. For example, the Presiding Member shares the Petitioner's disbelief in the statements of Parming and Christenson that they never discussed the ARS Chief position. That they would not have discussed one of the leading candidates for the position, especially considering Parming's deferral of the decision until the new Branch Manager's selection and Christenson's knowledge of Petitioner's grievance, seems implausible. The fact that Parming appointed Christenson as acting ARS Chief is further evidence of communication on the subject of ARS leadership. In addition, ambivalence in Parming's testimony regarding the nature of discussions held following the second-level interview indicates an effort to conceal her role in the selection process. However, despite these inconsistencies and corrections, the issue remains one of determining the actual influence Parming had on the selection decision. There was insufficient evidence that Parming in her handling of the grievance or Christenson in her conduct of the selection process, despite some irregularities and inconsistencies, deliberately impeded Petitioner's consideration for the ARS Chief position. Petitioner did appear on the list of eligibles, even though Ms. Parming was a panel member. Petitioner did receive an interview comparable to that received by the other candidates, despite the additional and permissible exposure provided external candidates. Petitioner did receive a favorable evaluation from Parming and Christenson, despite their efforts to diminish her qualifications at the hearing, but after the actual selection. Petitioner's grievance was processed in accordance with prescribed procedures and entailed no discernible negative feedback.

One can emphasize with a candidate whose promotional experience has been unsuccessful, especially when the person against whom she has filed a grievance participates in the selection process, but unless that participation rises to the level of undue influence a prohibited personnel practice has not occurred. Again, a telling omission is evidence that Petitioner's selection experiences varied significantly from that of the other internal candidate who did not file a grievance.

For the other actions in which a causal connection is alleged between Christenson and her supervisors such as: the detail proposal, the cancellation of the ARS vacancy, and the non-selection of Petitioner as acting ARS Chief, a plausible explanation has been given.

The remaining component of Petitioner's prohibited personnel practice case contains the allegation that her non-selection was based upon an unlawful preference for outside candidates. The requisite elements of proof in this charge are as follows:

1. A preference was granted.
2. The preference was not authorized by law.
3. The preference was granted to improve or injure someone's prospects.

The Petitioner's argument in support of her assertion that a preference was granted to external candidates consists of the following: (1) disinterested witness Mark Scully's testimony that Parming indicated in a June 1980 meeting that "she did not intend to select any of the internal GAO applicants, but that she intended to select from outside the agency," (2) Christenson's testimony that she was of the opinion that outsiders were preferable to avoid inbreeding, (3) Parming's advertisement of the ARS Chief position outside the normal sphere, and (4) the exclusive granting of second-level "interviews" to the external candidates.

The Respondent denies each allegation of the Petitioner with respect to the granting of a preference. Respondent maintains that the mere mailing of announcements to selected libraries on the basis of size provided no preference, but was consistent with recently enacted legislation designed to encourage competition. The Respondent fails to see how mailing the same vacancy announcement to external candidates that was received by the Petitioner created a preference.

The Respondent further maintains that "no inference of preference or advantage can be drawn from the relative timing of Petitioner's interview and the courtesy introductions." The fact that Petitioner's interview commenced prior to the meeting of the external candidates with Christenson's supervisors, that her record had been reviewed by Dwyer several months prior to the interview process, and that her supervisors had the opportunity to evaluate her performance for an extended period suggests to Respondent that if any preference accrued, Petitioner was the beneficiary.

In addition, Respondent maintains that the Petitioner "failed to offer any evidence that the Agency actions which facilitated the hiring of an external applicant, namely directing job vacancy announcements to large libraries and arranging for external candidates to meet the selecting official's superiors, were not authorized by law, rule, or regulation." Finally, Respondent argues that even if some unauthorized preference resulting from the meeting with the external applicants could be shown, Petitioner nonetheless failed to prove by a preponderance of the evidence "that those introductions were purposeful to injure her prospects for selection."

The Presiding Member is not persuaded that Petitioner has proven that her non-selection was based upon an unlawful preference for outside candidates. While the evidence is persuasive that the Agency went to greater lengths to advertise the ARS Chief's position than they had for similar level positions, there is no evidence that the broader mailing of vacancy announcement was unauthorized. That the Agency chose to exercise its management prerogatives and implement an Agency policy encouraging government-wide vacancies in the instant case is not tantamount to the granting of an unlawful preference. There is no evidence that the Agency waived its right to implement the policy by its infrequent past practice in this regard. Moreover, there is credible evidence that the policy in question arose from recently enacted legislation and the selecting official had previously selected external applicants. The statement attributed to Parming by Scully's hearsay testimony, unless corroborated by direct evidence of actions taken to injure Petitioner's prospects or influence Christenson's decision, carry insufficient weight. The Presiding Member has discussed these Agency actions at length and, for the most part, found them justifiable on various grounds. Similarly, Christenson's testimony that she preferred outsiders to avoid "inbreeding" is a limited preference consistent with Agency policies pursuant to the same goal. And, again, unless her conduct of the selection process is shown to have benefited the external candidates to the detriment of Petitioner or violated a law or regulation, it must be presumed a proper exercise of managerial discretion.

The primary element of Petitioner's claim of preference is the so-called second-level interviews granted the external candidates. Although the Presiding Member is persuaded that by the time Petitioner completed her interview on April 12, the selecting official had narrowed the field to the external "top" candidates, neither was a preference accorded these candidates nor an effort to injure Petitioner's prospects afoot. The fact that Petitioner completed her interview, albeit pro forma at that juncture, did not deprive her of a full opportunity to be interviewed and generally assessed on the merits. There is no evidence that the questions asked of the external candidates and the discussion which followed, stratified the selection process in a manner which was injurious to Petitioner. The Presiding Member believes that, contrary to Respondent's position, this meeting was more than a courtesy introduction, but less than the full-fledged interview which Petitioner asserts. In the Presiding Member's judgment, Petitioner would not have been selected even if she had received a second-level interview. Here, again, there is no evidence that the other internal candidate's omission from this phase of the process put him at a relative disadvantage. Most important was the existence of a legitimate business purpose for introducing external candidates to the Library supervision, which was not violative of any rule, regulation, or law.

In the final analysis, the Presiding Member concludes that the selecting official, Phyllis Christenson, based her selection on relevant factors. Having supervised the Petitioner and reviewed her records, Christenson was in a position to make an independent judgment of Petitioner's qualifications for the ARS Chief position. Although Parming played a role in the process and undoubtedly discussed the position with Christenson, her participation did not rise to the level of improper influence on the selecting official's decision. To be sure, Christenson and her supervisors took no actions to advance or promote Petitioner's candidacy, but, more importantly, from the standpoint of the allegations at bar, they did not take or fail to take actions surrounding the ARS Chief position which constituted a prohibited personnel practice.

Therefore, the Presiding Member holds that the Petitioner has failed to prove by a preponderance of the credible evidence that her non-selection was based either on reprisal for Petitioner's exercise of her grievance rights or on an unlawful preference for outside candidates.